

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN BILL TASH**, on February 12, 1999 at
3:00 P.M., in Room 437 Capitol.

ROLL CALL

Members Present:

Rep. Bill Tash, Chairman (R)
Rep. Cindy Younkin, Vice Chairman (R)
Rep. Aubyn A. Curtiss (R)
Rep. Rick Dale (R)
Rep. Bill Eggers (D)
Rep. Ron Erickson (D)
Rep. David Ewer (D)
Rep. Gail Gutsche (D)
Rep. Joan Hurdle (D)
Rep. Dan McGee (R)
Rep. Douglas Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney (D)
Rep. Bob Story (R)
Rep. Jay Stovall (R)
Rep. Carley Tuss (D)
Rep. Doug Wagner (R)

Members Excused: Rep. Hal Harper, Vice Chairman (D)
Rep. Rod Bitney (R)

Members Absent: None.

Staff Present: Deb Thompson, Committee Secretary
Kathleen Williams, Legislative Branch

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 520, HB 429, 2/9/1999
Executive Action: HB 486; HB 487; HB 505

HEARING ON HOUSE BILL 520

Sponsor: Rep. Ron Erickson, HD 64, presented the bill. He explained the bill addressed reclamation to further define surface and ground water use and degradation of adjacent properties. He said there should be bonding for surface water down gradient

Proponents: Jeff Barber, Montana Environmental Information Center, spoke in favor of the bill. He presented press clippings from the Summitville Mine where acid from mining sterilized 17 miles of drainage and there was no money for clean up.

EXHIBIT(nah35a01), EXHIBIT(nah35a02), EXHIBIT(nah35a03), EXHIBIT(nah35a04), EXHIBIT(nah35a05) He hoped to show the need for a bonding provision. He supported amending out section 3. **EXHIBIT(nah35a06)**

Bonnie Gestring, representing Stephanie Shammel, read her testimony. **EXHIBIT(nah35a07) {Tape : 1; Side : A; Approx. Time Counter : 12.7}**

Bruce Farlander, representing Montana Trout Unlimited, said the bonding requirement was a good idea and the industry should support it. If promises are broken the bond would cover damages.

Jon Krutor, a rancher from Ovando and Executive Director of the Blackfoot Legacy, testified in support of the bill. He related a story regarding the massive changes on the landscape. He said this bonding would act like an insurance policy. **{Tape : 1; Side : A; Approx. Time Counter : 20.9}**

James Olson, Friends of the Bitterroot, supported the bill. He noted the impact mines had on the land.

Ralph Allen from Ovando supported the bill. He said it was important to protect the watershed. **{Tape : 1; Side : A; Approx. Time Counter : 26.5}**

Opponents: Doug Parker, representing ASARCO, involved in mining and permitting activities in Montana for over twenty years and a hydrologist, spoke against the bill. He distributed a letter from Missoula. **EXHIBIT(nah35a08)** He said it was good that the burden of proof section was removed from the bill since it potentially would have serious impact on the mining industry. He pointed out concerns about the apparent expansion of the non-degradation concept, targeting mining. The bonding issue, as written, could result in huge financial requirements which are unwarranted. He pointed out a possible interpretation would disallow a mining activity that could not completely replace an

entire aquifer. This puts in very large costs on the front end. There are other laws in place that protect water. A mine with significant surface disturbances requiring that the beneficial uses within that area be maintained is unrealistic. Water discharges and effects at the property boundary or the point of discharge come under the Clean Water Act. The mining effects are contained within the mine area. This bill would say suddenly that there can be no effects within the mine area, which is not possible. This is a new concept that means there can be no mining. **{Tape : 1; Side : A; Approx. Time Counter : 27.8 - 38.2}**

Bill Snoddy, McDonald Gold Project in Lincoln, spoke against the bill. Mining does have an impact on the landscape and the environment. Mitigation of those impacts through MEPA is what the permitting process is all about. He said the McDonald Project had gone beyond the requirements of the state of Montana to make sure the water, land and air are protected. He was concerned that the bonding section of the bill was vague and it was unknown how it would be calculated. **{Tape : 1; Side : A; Approx. Time Counter : 32.6 - 40.8}**

Jill Andrews, representing the Montana Mining Association, spoke as an opponent. She interviewed each mine to find out what their bonds were and how much it would cost to reclaim the land. Every single case had 20% more in bonds even if somebody else had to reclaim it. She said the bill was unnecessary. She pointed out the issue of the C.R.Kendall mine and what they had done to satisfy Mrs. Shammel. She said Mrs. Shammel was the person in the voter pamphlet as a proponent of I-137 and she cut a TV commercial for MEIC. She quoted from a mining company letter, "We cleaned their stock ponds..., we exchanged land with the Shammels, they are getting surface, minerals and good timbers in exchange for surface and linear timber. The Shammel children have been employed for the past three summers to assist with our Peregrine Falcon reintroduction program. The Shammel family has been allowed free grazing on C.R. Kendall land and has paid \$1 per year to graze on our other land. The DNRC has found C.R. Kendall is not responsible for the water losses claimed by the Shammel's and moreover, the Shammel's know full well that C.R. Kendall is piping water into their stock tanks at Section 29 Springs, despite the fact that the spring continues to flow on its own. To say anything else is a lie."

Questions from Committee Members and Responses: Rep. McGee asked about the words "pollution" and "degradation" and if these were defined already in the code. Rep. Erickson replied there was some concern regarding the definition of degradation and whether it tied to the non-degradation term in the water act. He said degradation referred to the common sense definition.

Rep. Ewer asked Doug Parker if the term "beneficial uses" was a vague term in respect to water. Parker replied water rights were well defined but not water uses. Rep. Ewer asked about "proximate". Parker replied this was not used in the permit process.

Rep. Hurdle commented that the Shammels were not adequately compensated and the pollution still occurs on their property.

{Tape : 1; Side : A; Approx. Time Counter : 49.2-55}

Rep. Hurdle asked if the Kendall mine was an isolated case and if there were others. Parker replied the DEQ had investigated this case over a number of years and they and the DNRC, relative to the water rights issue, have found that there was not an impact from the mine to the spring in question. Despite that fact, the C.R. Kendall has provided them replacement water. He did not know other examples. Rep. Hurdle asked for information on the mining permitting process designed to prevent ground water and surface water pollution. Parker described the Rock Creek Project, a permitting process that began in 1988. That was proceeded by three years of data collection including surface water and ground water. That data collection has continued to the present and they have spend millions of dollars establishing information for the site, including drilling wells, setting up sampling of surface waters and sampling local area wells. The area covered in the baseline sampling and data collection is at least a mile past the mine property and continues down gradient based in part by decision from DEQ hydrologists. He described the public process through MEPA, EIS and public information that was available, as well as the state and federal agencies doing an evaluation as to impact. This is an extensive process to get to the point before a permit actually occurs.

Rep. Ewer said he had no interest in creating bonding barriers that prevented mining.

Rep. Dale asked Jill Andrews if the same water quality applied to the Department of Highways. Andrews replied contractors only bonded through the completion of the project. This bill would require bonding in perpetuity. **{Tape : 1; Side : A; Approx. Time Counter : 57.5}**

Rep. Dale asked about a situation regarding the Golden Sunlight Mine being tagged for cyanide being found in wells that was caused by the Highway Department. Andrews replied that road salt contains much more cyanide than the mining industry uses in their 2% solution.

Closing by Sponsor: Rep. Erickson closed. He pointed out the concern addressed by the bill was the down gradient.

{Tape : 1; Side : B}

HEARING ON HOUSE BILL 429

Sponsor: Rep. Jim Shockley, HD 61, presented the bill and amendments. **EXHIBIT(nah35a09)** He explained this bill dealt with the temporary closure of the Bitterroot Basin for a two year period. The water in the basin is over appropriated. This is the fastest growing county in the state and subdivisions are cropping up quickly. There is a lot of pressure on water users. The bill will stop further filing for permits. He distributed testimony from Ravalli County. **EXHIBIT(nah35a10), EXHIBIT(nah35a11)**

Proponents: Bud Clinch, Director of Department of Natural Resources and Conservation, spoke in favor of the bill. He explained the DNRC was Montana's water management agency. The bill was initiated from the basin residents to address the challenges facing them. He clarified the bill would temporarily close surface water sources in this basin and the development of most new water rights. It would continue to allow for emergency appropriations of surface water. It would allow for water storage facilities and would allow for the development of municipal water sources. The bill would not limit or restrict the development of ground water resources. It would not limit the statutory processes which allow stream line water development on small yield wells of less than 35 gallons per minute and 10 acre feet and it does not limit, restrict or impeded the ongoing process to inventory and adjudicate Montana's water rights through the Water Court. **EXHIBIT(nah35a12) {Tape : 1; Side : B; Approx. Time Counter : 5.8 - 8.1}**

Pat Graham, Executive Director of Fish, Wildlife and Parks, spoke as a proponent. He pointed out the significant droughts in the basin and the need for cooperative management of the water.

EXHIBIT(nah35a13) {Tape : 1; Side : B; Approx. Time Counter : 10.6}

Holly Franz, representing Montana Power Company, spoke in favor of the bill. The Montana Power Company has one dam downstream from the Bitterroot which is Thompson Falls Hydroelectric Dam. The company agrees that the Bitterroot is over appropriated. One indication of some of the water rights problems is the division of the sub-basin into smaller basins because of the large number of water rights problems they have had with subdivisions and

allocation of those water rights. **{Tape : 1; Side : B; Approx. Time Counter : 12.3}**

Harley Haskett, a farmer in the district for 28 years, spoke in favor of the legislation. He was an irrigation district board member and on the Bitterroot Water Forum. He noted the first homicide in Montana occurred in the Bitterroot valley over water, and it was justified, he joked. **{Tape : 1; Side : B; Approx. Time Counter : 12.6 - 14.4}**

Robert Christ, a rancher and irrigator and Master of the Rocky Mountain Grange, testified for the bill. He said it was a bill whose time had come and was needed. Presently, the situation is creating problems among neighbors.

Howard Lyons, Secretary Treasurer of the Bitterroot Stockgrowers, spoke in support of the bill. He noted the association had a membership of approximately 100 families. He said they had the same feelings that permitting should be stopped until the courts catch up to how much water they have and what has happened to it. They hope the intention of the bill remains intact.

Marshall Bloom, representing Bitterroot Trout Unlimited, spoke as a proponent. He distributed his testimony. **EXHIBIT (nah35a14)**

Jennifer Salisbury, Montana Stockgrowers Association, supported the bill.

James Olson, Friends of the Bitterroot, spoke for the bill. He said their conservation group was happy to see this bill. September 9, 1805, Meriwether Lewis wrote "a handsome stream, about 100 yards wide, affords a considerable quantity of very clear water", that was when he was on the Bitterroot River. He pointed out the bill would help keep it that way especially during low water season.

Brian Langton, a fourth generation irrigator and the Chairman of the Bitterroot Water Cooperative, testified for the bill. The Coop represents 1500 families, irrigating 30 thousand acres combined. He stressed the importance of protecting historical rights. He described problems related to the creation of a 24 acre pond. Senior water right holders could not draw water from the stream due to this diversion.

Roxa French, Bitterroot Water Forum Project Coordinator, testified on the bill. She explained the river had nearly 3/4th of the area under federal management. Private water use was a narrow corridor of the valley water. Annual valley precipitation

is about 12". Surface and ground water are highly interrelated. The group is in favor of the temporary closure of the basin.

Charles Van Hook, a consulting biologist working in wetland restoration and conservation, spoke in favor of the bill. He said reconfiguration of surface water movement had diminished the seasonal availability of water to wetland sites. Nearly all water which moves across the valley is now part of an irrigation system and these systems are not designed to preserve wetlands. He had amendments attached to his testimony. **EXHIBIT (nah35a15)**
{Tape : 1; Side : B; Approx. Time Counter : 21.3}

Mike Murphy, representing Montana Water Resources Association, said the association wanted to go on record supporting the bill. He said it was highly likely that the basin has reached a permitting limit for larger surface rights. The association was concerned there be an exception for livestock water rights for small use permits.

Dave Jones, from Hamilton and a member of the Bitterroot Water Forum, spoke in support of the bill. He has been a trout fishing guide for over 15 years and demonstrated how the recreation industry relies on the water. **{Tape : 1; Side : B; Approx. Time Counter : 26.3}**

Bob Banner from the Charlo Irrigation District urged passage of the bill and the amendments. He said he was concerned about costs that are created if the bill is not passed, through monitoring and costs to DNRC for special hearing units.

Rob Johnson, one of the organizers of the Bitterroot Water Forum that started out four years ago, spoke in favor of the bill. The bill would provide for the necessary time and alleviates an increasing problem as more people move to the area.

Opponents: David Schmidt, a water rights consultant in Helena, spoke on behalf of Water Rights, Inc. and Mr. Lee Gellen of Missoula who works extensively in the Bitterroot, against the bill. He presented testimony from Mr. Gellen. **EXHIBIT (nah35a16)** Gellen presented issue statements with supporting data, (see exhibit). The bill should exempt domestic uses. His consulting firm represents 70% of the largest farms and ranches in the valley and none of his clients support closure. **{Tape : 1; Side : B; Approx. Time Counter : 31.1 - 35.7}**

Questions from Committee Members and Responses: Rep. Younkin asked Jack Stultz from DNRC to address the exemption to store water during high spring flow. She asked if applications were accepted for storage. Stultz replied this was not a problem.

Storage is a component of a water right and a component of another use. Rep. Younkin asked about adding an exception for an application for a non-consumptive use. Rep. Shockley said that was not a problem.

Rep. Raney asked about support for wetlands. Rep. Shockley replied much of the wetlands existed in part from irrigation. The valley was a desert during the Lewis and Clark expedition. He pointed out if there was no more water to irrigate there was no more water to make wetlands. If there were, they could do it with a 50 acre impoundment for beneficial use.

Rep. Ewer asked Mr. Stultz about the conflicting testimony and if it was his opinion that the basin was over subscribed or was the issue backlogged adjudication. Stultz replied the Bitterroot Basin had a history of conflict over water availability. This was not a question of a slow adjudication process but was a question of water availability and conflict over the water.

Rep. Tash pointed out in accordance with the Montana Water Use Act, irrigators were advised to file on every optimum drop of water.

Rep. Stovall asked about the concerns regarding livestock having priority during a drought over irrigation rights. Rep. Shockley replied this did not address federal water rights. Mike McGlenn, a water shed planner working with the Bitterroot Water Forum, described other basin closures in the state. When looking at the Bitterroot Basin, between existing filings and the fact that stock water is an exempt use. If it is a place where cows have grazed there is probably already a right there. Virtually everyone has already filed on their stock water. **{Tape : 1; Side : B; Approx. Time Counter : 49.9 - 50.8}**

Closing by Sponsor: Rep. Shockley closed. He pointed out people with a weak right could file now. He pointed out domestic use had only 17 domestic use permits in the whole valley, after 1973. You cannot get a loan on a house by using surface water.

EXECUTIVE ACTION ON HOUSE BILL 486

Rep. Younkin **MOVED DO PASS**. She distributed an amendment that would address department approval of institutional controls. She **MOVED** the amendment. The question was called. The motion **PASSED** unanimously. **EXHIBIT(nah35a17) {Tape : 2; Side : A}**

Rep. Younkin **MOVED DO PASS AS AMENDED**. She discussed institutional controls in general and they may have been

perceived as a substitute for cleaning up the problem, and they are not. She referred to the statute that required that remedial action be initiated to clean up and there was no change in this requirement. An institutional control will allow the polluter to take additional measures after the clean up to insure that public health and safety can be protected. **{Tape : 2; Side : A; Approx. Time Counter : 6 - 7.9}**

Rep. Raney said he felt this could be used as a remedy. He saw an institutional control as a way to keep people off the land but it does not remedy or mitigate the situation. He noted that voluntary cleanup was the most hotly contested environmental issue last Session of the Legislature and a sunset provision was put on it to see if it worked. This bill would repeal the sunset which means that voluntary cleanup continues without anybody coming in to give a cost-benefit analysis or a record to show whether the program worked or not. **{Tape : 2; Side : A; Approx. Time Counter : 10.5 - 13.3}**

Rep. Younkin replied that institutional control was not intended to mitigate pollution, rather it would mitigate the risk to public health. The requirement for clean up was still there.

Rep. Tuss said it was important to realize that regardless of how sophisticated the technology, there comes a point of diminishing return. It makes sense to alter the approach. Institutional controls are necessary to protect the public. She pointed out the Russian nuclear explosion. She talked about the golf course that was capped and had an alternative use for the foreseeable future, which was appropriate and reasonable. **{Tape : 2; Side : A; Approx. Time Counter : 21.9}**

The question was called. The motion **PASSED** 14-6 with Reps. Raney, Gutche, Harper, Hurdle, Erickson and Eggers voting no.

EXECUTIVE ACTION ON HOUSE BILL 487

Rep. Younkin **MOVED DO PASS**. She explained the bill was related to CI-75. The question was called. The motion **PASSED** with Reps. Raney, Hurdle, Gutche, Eggers, Harper and Erickson voting no.

EXECUTIVE ACTION ON HOUSE BILL 505

Rep. Younkin **MOVED DO PASS** and **MOVED** the amendment. **EXHIBIT (nah35a18)** The question was called on the amendment. The motion **PASSED** unanimously. **{Tape : 2; Side : A; Approx. Time Counter : 27.9}**

Rep. Gutche said she had amendments but wanted to defer action until she could address concerns.

Rep. Ewer **MOVED TO TABLE** the bill. The motion **PASSED** 11-9.

EXECUTIVE ACTION ON HOUSE BILL 158

Rep. Ohs **MOVED** to take HB 158 off the table. He explained the program would privatize the inspection of the underground storage tanks. Currently the tanks were only inspected every 5-6 years.

Rep. Ewer pointed out the issue that hung up was the department wouldn't budge on giving Missoula some slack. **{Tape : 2; Side : A; Approx. Time Counter : 32.6}**

Rep. Ohs said their were amendments offered by Burlington Northern Santa Fee.

Rep. Wagner said his concern was in inundating the voters on the ballot. He would prefer to wait for the CI-75 issue to be resolved.

Rep. Ohs said the amendment addressed moving the inspection from every two years to every three years. There is an amendment that the inspectors license would need liability insurance.

Rep. Tash pointed out the EQC dealt with the issue and the importance of solving problems was identified since there are tanks that are leaking. Then this could be coordinated with federal EPA requirements in protecting groundwater supplies.

Rep. Tuss said she was troubled that the inspection could be three years for private but would not be extended to three years for a public entity. A private system may mean a small business may have to pay \$300-700 per hour to have an inspection as opposed to getting it done from a city-county public health sanitarium for \$25-50 an hour.

Rep. Ohs pointed out without underground storage tank inspectors, as time goes on the tanks are in a great deal of jeopardy. In order to get the job done properly it would require a great deal of personnel on the part of the department and the department felt it was much better to have private inspectors doing the job. **{Tape : 2; Side : A; Approx. Time Counter : 37}**

Rep. Hurdle said her main concern was that there was privatization of the regulation of ground water which was clearly a department responsibility. Rep. Raney noted the trouble

Missoula County had over ground water. They want to make sure the public had control over what is taking place in their ground water. There should be provisions for the counties to take care of their ground water. Rep. Ohs said the department is ultimately responsible. They are just putting the inspectors in the hands of private entrepreneurs who are willing to do it.

The question was called. The motion to take HB 158 off the table **PASSED** 11-9.

Rep. Ohs **MOVED HB 158 AS AMENDED**. Number one of the 02 amendments was segregated. He explained this would make it a three year inspection. Rep. Raney asked what the reason for moving from one to three. Rep. Ohs replied they were trying to work out an agreement between the department and the industry. Rep. Raney said he would prefer two years to get the tanks inspected. The question was called on changing two years to three years. The motion **FAILED**.

Rep. Ohs discussed the #03 amendment which addressed liability insurance. Kathleen Williams explained this would require an insurance policy of 1/2 million and addressed how the provision would allow an owner operator to bring an action. Rep. Ohs **MOVED** the amendment.

Rep. McGee asked why this would be necessary since anybody can sue. Rep. Younkin replied the motivation for the whole section was the prevailing party attorney clause. Rep. McGee asked that #1 and #2 be segregated.

Rep. Ewer said he was opposed to amendments #1 and #2. If you want inspections and lay on a large surety bond requirement it would defeat the purpose. The people that get inspected would like this and there would not be enough inspectors.

Rep. Raney asked how much a surety bond of 1/2 million dollars would cost. Rep. McGee said his Errors and Omissions insurance was about \$3,000 a year and the Commercial General Liability insurance cost \$1500-2000 a year.

The question was called on amendment 1 and 2. The motion **PASSED** 11-9.

Rep. Younkin **MOVED** amendment #3 and #4. She said this was the attorney fee provision for the prevailing party. The question was called. The motion **FAILED** 10-10.

The question was called on the bill as amended. The motion **FAILED**.

ADJOURNMENT

Adjournment: 6:35 P.M.

REP. BILL TASH, Chairman

DEB THOMPSON, Secretary

BT/DT

EXHIBIT (nah35aad)